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Supreme Court, U.S.
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OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

KEYSTONE LAND & DEVELOPMENT COMPANY,
Petitioner,

v.

XEROX CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL APPENDIX

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APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C01-1018

[Filed, March 14, 2002]

KEYSTONE LAND & DEVELOPMENT COMPANY, Plaintiff,	)
v.	)
XEROX CORPORATION, Defendant.	)

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER came before the Court on two related motions. Plaintiff filed a motion for partial summary judgment on the grounds that Plaintiff and Defendant entered into a binding contract and Defendant breached the contract and the implied covenant of good faith and fair dealing. Dkt No. 42. Defendant filed a motion for summary judgment on the

grounds that Plaintiff's breach of contract claim fails due to the contingent nature of the agreements, statute of frauds violations, and a lack of consideration. Dkt No. 44. Both parties argued their motions before this court on March 8, 2002. After considering the papers and pleadings filed herein, and having heard oral argument, Defendant's motion is GRANTED and Plaintiffs motion is DENIED for the reasons stated below.

Background

In early 2001, Defendant decided to sell its Tukwila, Washington commercial building (the "Xerox Building") and lease it back from the new owner. Defendant hired Jones Lang LaSalle ("JLL") as its broker and JLL associated Kidder Mathews Segner ("Kidder"), a local brokerage firm. Kidder put out a call for offers in February, 2001.

On March 8, 2001, Plaintiff submitted an Offer to Purchase the Xerox Building to Kidder. The offer letter stated that it "shall be incorporated into a binding Purchase and Sale Agreement upon execution by both parties." On April 4, 2001, Kidder requested that Plaintiff submit a final and best offer and informed Plaintiff of its offer's "critical issues" (i.e. non-competitive terms). On April 6, 2001, Plaintiff submitted an amendment to its Offer to Purchase. The amendment letter concluded with the statement that Plaintiff was "prepared to proceed towards completion of a mutually acceptable Purchase and Sale Agreement for the property."

On April 10, 2001, Kidder forwarded a letter to Plaintiff which stated: "Xerox is prepared to negotiate a Purchase and Sale Agreement with Keystone Development subject to two modifications to your Proposal." The letter ended with the following statements: "If these modifications are acceptable

to you, please have Keystone Development acknowledge their agreement below. We can then proceed immediately to draft the Purchase and Sale Agreement for review and execution." This letter was signed by Kidder employees, not by Defendant. On April 13, 2001, Plaintiff's president signed the April 10th Kidder letter, in effect acknowledging its acceptance of the modifications.

Defendant began its due diligence and sought counsel to negotiate a Purchase and Sale Agreement after it received the signed letter from Plaintiff. Kidder requested assurances from Plaintiff's prospective lender that financing would be available and Plaintiff sent a letter stating it had a strong financial background and could close the deal. Kidder also contacted an officer from Key Bank, who was familiar with the proposed sale. Plaintiff asserts that Kidder did not begin inquiring into Plaintiff's financing until after receiving a higher offer from the City of Tukwila.

In early May, Plaintiff contacted Kidder to inquire about the status of the Purchase and Sale Agreement, which Plaintiff believed Kidder was preparing. On May 11, Defendant's legal counsel informed Plaintiff that it would not sell the building to Plaintiff and that it intended to accept another offer. Subsequently, Plaintiff filed this breach of contract suit in King County Superior Court and Defendant removed it to federal court on the basis of diversity jurisdiction.

Analysis

I. Contract Formation

The basic question here is whether the letters exchanged between Plaintiff and Defendant established a contract. The burden of proving a contract, whether express or implied, is

on the party asserting it, and this party must prove each essential fact, including the existence of a mutual intention. Cahn v. Foster & Marshall, Inc., 33 Wn. App. 838, 840 (1983).

In order to form a contract, the parties must manifest to each other their mutual assent to the same bargain at the same time. Pacific Cascade Corp. v. Nimmer, 25 Wn. App. 552, 555-56 (1980). The element of mutual assent is satisfied by a promise to render a stated performance in exchange for a return promise being given. Id. at 556. However, the intention to do a thing is not a promise to do it and an agreement to negotiate a contract in the future is nothing more than negotiations. Id.

A. Intention to Execute a Formal Agreement

The fact that parties intend to execute a subsequent agreement is strong evidence that they do not intend the previous negotiations to amount to a proposal or acceptance. Pacific Cascade, 25 Wn. App. at 556. "If from a promise, or manifestation of intention, or from circumstances existing at the time, the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given a further expression of assent, he has not made an offer." Id. at 557.

The intention to execute a subsequent agreement, however, does not bar the finding that a contract exists. Loewi v. Long, 76 Wash. 480, 484 (1913). If the subject matter is not disputed, the terms are agreed upon, and the parties' intentions are plain, then a contract exists by virtue of the informal writings even though they may contemplate that a more formal contract shall be subsequently executed. Id. at

484. The writings must specify all the material and essential terms of the contract and leave none to be agreed upon during further negotiations. Hubbell v. Ward, 40 Wn.2d 779, 785 (1952).

To determine whether informal writings are sufficient to establish a contract despite the parties' intention to sign a more formal written agreement, Washington courts consider whether (1) the subject matter has been agreed upon; (2) the terms are all stated in the informal writings; and (3) the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract. Morris v. Maks, 69 Wn. App. 865, 869 (1993).

In this case, the critical question is whether the parties intended a binding agreement prior to the execution of a formal Purchase and Sale Agreement. Washington courts use the objective manifestation theory in construing the words and acts of alleged contractual parties. Morris, 69 Wn. App. at 871. Through application of this theory, the court imputes to a person an intention which corresponds to the reasonable meaning of his or her words and acts. Id. Intentions which are not expressed are ineffectual. Id.

Defendant states that the Plaintiff's Offer to Purchase reveals Plaintiff's understanding that a binding legal obligation would not begin until execution of a Purchase and Sale Agreement. In this letter, Plaintiff wrote that the terms of the offer "shall be incorporated into a binding Purchase and Sale Agreement upon execution by both parties." Further, Plaintiff stated that the Offer to Purchase was "specifically subject to" Plaintiff's review and written approval of the ground lease, parking lease, an engineering study, mutual agreement with respect to all terms and conditions of the lease agreement, satisfactory review of all information related to

asbestos, an environmental assessment, and "execution of a Purchase and Sale Agreement with (sic) thirty (30) days from execution of this letter of intent." Plaintiff concluded the letter by stating that it looked forward to the possibility of completing a Purchase and Sale Agreement and entering into a long-term relationship with Defendant.

Plaintiff's amendment letter also anticipates the future completion of a Purchase and Sale Agreement. This letter concludes with the statement that Plaintiff "is prepared to proceed towards completion of a mutually acceptable Purchase and Sale Agreement for the property."

The counter-offer letter, Defendant's letter that requested modifications to Plaintiff's amended offer, stated that Defendant was prepared "to negotiate a Purchase and Sale Agreement with Keystone" subject to two modifications. The letter asked Plaintiff to accept the modifications and indicated that Defendant would draft the Purchase and Sale Agreement for review and execution after acceptance. Plaintiff signed this letter without adding any language about the binding or non-binding nature of it.

In looking at the language of these letters, it is evident that the parties did not intend the letters to be binding. All of the letters clearly contemplated a future Purchase and Sale Agreement. Defendant stated that it anticipated further negotiation. Plaintiff used the term "binding" when it described the forthcoming Purchase and Sale Agreement, which indicates that it believed that acceptance of the Offer to Purchase would not be binding. Further, Plaintiff stated that the Offer to Purchase was specifically subject to execution of a Purchase and Sale Agreement within thirty days from execution of "this letter of intent." The statement that the offer was subject to its review of the Purchase and Sale

Agreement further evidences Plaintiff's intent that its offer would not be binding.

B. Statute of Frauds

The statute of frauds requires that "[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate shall be by deed." RCW 64.04.010. It also requires that every deed be in writing, signed by the party to be bound, and acknowledged by the party before an authorized person to take acknowledgment of deeds. RCW 64.04.020. Failure to comply with the statute of frauds renders an agreement unenforceable.

In addition to intent issues, Defendant states that the exchanged letters do not form an enforceable contract because they fail to comply with the statute of frauds. Defendant asserts that the statute of frauds issues include the lack of a legal description of the property, the lack of a promise to sell the building, and the failure of Defendant to sign the letters.

i. Defendant's Ability to Use the Statute of Frauds Defense

Before reaching Defendant's statute of frauds arguments, Plaintiff's argument that Defendant is unable to use the statute of frauds defense must be addressed. Plaintiff has raised the following two arguments against Defendant's ability to use the statute of frauds defense.

First, Plaintiff asserts that Defendant waived the statue of frauds defense by failing to raise it in its motion to dismiss or in its first answer. Plaintiff filed a second amended complaint pursuant to a stipulation and agreed order amending the

complaint. Five days later, Defendant filed an amended answer that included the statute of frauds defense. Rule 8(c) of the Federal Rules of Civil Procedure states that a party shall set forth affirmatively a statute of frauds defense "in a pleading to a preceding pleading." In addition, Rule 15(a) requires that a "party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders." Fed. R. Civ. P. 15(a).

Based upon the language of the Federal Rules, Defendant is not barred from amending its answer. The Rules do not bar parties from amending their responsive pleadings merely because the pleading was amended pursuant to a stipulation of the parties. Further, the stipulation and agreed order clearly does not bar Defendant from filing an amended answer since it declares that "Xerox is not required to file an answer to the amended complaint." Thus, Plaintiff's argument that Defendant waived its right to amend its answer fails.

Second, Plaintiff asserts that Defendant is estopped from using the statute of frauds defense because Xerox breached its promise to draft a Purchase and Sale Agreement, a document which would have satisfied the statute of frauds. To support this theory, Plaintiff uses a case in which a franchisor breached its promise to a franchisee to execute a franchise agreement. Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wn.2d 255,260 (1980). The franchisee was allowed to bring an action for breach of oral contract, despite the unsatisfied statute of frauds requirements, based on the theory of promissory estoppel. Id. However, in Klinke, there was no question of the parties' intent to form a contract; both franchisor and franchisee manifested their intent to form a franchise agreement and franchisee clearly relied on this

promise when he sold his business, moved to Washington, and searched for an appropriate location for the restaurant. Klinke is inapplicable to this case because neither Plaintiff nor Defendant manifested their intent to form a contract nor made a promise to buy or sell. See Section A, above.

ii. The Elements of the Statute of Frauds Defense

a. Legal Description

A contract to transfer an interest in real property must contain a description of the land sufficiently definite to locate it without reliance on oral testimony or a reference to another instrument that contains a sufficient description. Bigelow v. Mood, 56 Wn.2d 340, 341 (1960). Agreements that do not contain an adequate legal description of the property are void. Berg v. Ting, 68 Wn. App. 721,727 (1993).

The legal description must contain a description of the property by correct lot number, block number, addition, city, county, and state. Key Design, Inc. v. Moser, 138 Wn.2d 875, 881 (1999).

The most frequent cause of an inadequate description is the use of a street address, which is not sufficient in Washington. William B. Stoebuck, 18 Wash. Prac., Real Estate: Transactions § 12.3.5 (2001). In Key Design, the Washington Supreme Court reaffirmed the proper legal description requirement and held that a property description using the business name, street address, city, county, and state did not meet the requirement. 138 Wn.2d at 881.

Here, Plaintiff's Offer to Purchase did not include a proper legal description of the property. The description included the building's common name, street address, city,

state, and square footage; it did not include the lot number, block number, or county. Plaintiff even acknowledged in its Offer to Purchase that the above description was not a proper legal description by stating that the legal description "shall be provided by [Xerox] and shall be subject to review and approval by [Keystone]." In addition, the other letters involved also did not contain a proper legal description of the building. Therefore, the letters fail to meet the statute of frauds requirement of a proper legal description.

Plaintiff argues that the Xerox building is located on unplatted real estate, and therefore the requirement of a proper legal description does not apply. Further, Plaintiff claims that the Bigelow test is met because (1) the description is sufficient to locate the property without resort to oral testimony; (2) the offer letter refers to the "Ground Lease," which contains a full legal description of the property; and (3) the parties contemplated incorporation of the legal description once Xerox delivered it to Keystone.

Even if the property is unplatted, the description is not sufficient under the rule set forth in Key Design. In comparison to the parties in Key Design, Plaintiff included even less information in its description of the property and easily could have included the block number and county. Further, "contracts for the sale of unplatted as well as platted land must contain the legal description." William B. Stoebuck, 18 Wash. Prac., Real Estate: Transactions § 15.3 (1995).

Plaintiff's claim that the Offer to Purchase refers to the Ground Lease is a bit misleading. Plaintiff did not mention the Ground Lease in conjunction with the description of the property and never stated that the Ground Lease should be consulted for the proper legal description. In fact, based upon

the offer letter's language, Plaintiff had not seen the Ground Lease before submitting its Offer to Purchase and stated that the offer was contingent upon review and approval of the Ground Lease. Thus, the Offer to Purchase did not refer to a document that contained a sufficient description of the property.

A legal description may be valid if the contract authorizes an agent for the vendor to later fill in the legal description and the agent does so. Edwards v. Meader, 34 Wn.2d 921,925 (1949). In Edwards, the agreement in question was an earnest money agreement that was signed by both parties and the legal description was phrased: "1136 Vandalia Legal Des. to be entered by agent." Id. at 923. The agent entered the legal description one to two days later. Id. Here, the legal description still had to be approved by Plaintiff. Plaintiff certainly did not give Defendant or Kidder the authority to automatically enter the legal description. Thus, this argument fails as well

b. Promise to Sell

In order to satisfy the statute of frauds, a writing must reveal the intent by the signing party to be presently bound. Hunt v. Great Western Sav. Bank., 54 Wn. App. 571,574 (1989). Defendant correctly asserts that the letters involved in this case do not contain a promise by Defendant to sell or by Plaintiff to buy the Xerox Building.

c. Signature

The statute of frauds requires that every deed be in writing and signed by the party to be bound. RCW 64.04.020. The letters in question were signed by Kidder, not Defendant, and thus Defendant claims that the statute of frauds signature

requirement has not been met. Defendant further asserts that Kidder did not have the power to bind Defendant.

When a corporation wishes to sell an interest in real property, the agreement must be signed by an officer or member with signing authority. Brokers generally do not have the power to enter into a contract binding the principal to convey land. Lee v. Estabrook, 28 Wn.2d 102, 108 (1947).

> "Unless the listing agreement specifically gives him additional powers, a broker has no power to execute a contract for his principal or to make a binding agreement as to the terms of sale. This has been long and well established in Washington. Authority to make a binding agreement must be clearly granted, for it has been held that general words such as an instruction to 'sell' or to 'go ahead and make the deal' do not grant such authority."

William B. Stoebuck, 18 Wash. Prac., Real Estate: Transactions § 14.7 (2001). However, an agent who has authority to sell real estate may bind his principal with respect to the rights of third parties without violating the statute of frauds. Rekhi v. Olason, 28 Wn. App. 751,755 (1981).

The listing agreement does not give JLL or Kidder the authority to bind Defendant in the sale of its Tukwila building. It states that Defendant engaged JLL for the "sole purpose of procuring a buyer for the premises." The First Amendment to the listing agreement, which acknowledges Defendant's consent to JLL's sub-agency agreement with Kidder, reiterates that Defendant engaged JLL as its exclusive real estate broker for the "sole purpose of procuring a buyer for the premises." The agreement outlines JLL's duties, commission terms, and indemnities. It also states that all

proposed sale arrangements shall be delivered to Jack Bradford of Xerox. There is no clause giving JLL or Kidder the power to bind Defendant in a sales agreement.

II. Duty of Good Faith and Fair Dealing

Plaintiff states in its motion that Defendant breached the implied covenant of good faith and fair dealing when it failed to negotiate a Purchase and Sale Agreement with Plaintiff. Plaintiff correctly states that the covenant is implied in every contract. However, under Washington law, whether Defendant breached this covenant depends on whether there was a binding contract. The implied covenant applies only to the performance of specific contract obligations. Badgett v. Security State Bank, 116 Wn.2d 563, 570 (1991). "If there is no contractual duty, there is nothing that must be performed in good faith." Johnson v. Yousoofian, 84 Wn. App. 755, 762 (1996). Thus, whether the implied covenant of good faith and fair dealing applies hinges on the existence of a contract. As explained in Section A, above, the parties did not form a valid contract, and therefore the implied covenant of good faith and fair dealing does not apply.

Conclusion

Defendant's motion for summary judgement is GRANTED and Plaintiff's motion for partial summary judgment is DENIED. The clerk is directed to send copies of this order to all counsel of record.

Dated this 14 day of March, 2002.

/s/_____

Marsha J. Pechman
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C01-1018P

[Filed, July 12, 2002]

KEYSTONE LAND & DEVELOPMENT COMPANY, Plaintiff,	)
v.	)
XEROX CORPORATION, Defendant.	)

ORDER GRANTING PARTIAL SUMMARY JUDGMENT FOR DEFENDANT ON ISSUE OF LIS PENDENS LIABILITY

This matter comes before the Court on cross-motions brought by the parties. Defendant has brought a motion for partial summary judgment, seeking a determination of plaintiff's liability as a matter of law for the filing of a lis pendens against real property owned by defendant. Dkt. No. 81. Plaintiff has brought a cross-motion for summary judgment, seeking exemption from liability on the same issue.

Dkt. No. 78. Having considered the pleadings filed by the parties, and having reviewed the record, the Court ORDERS as follows:

- Defendant's motion for partial summary judgment (Dkt. No. 81) is GRANTED.

- The Court will award costs and attorneys' fees to defendant pursuant to RCW 4.28.328(3). At the conclusion of this litigation, defendant may submit an accounting of costs and fees. Before the Court orders payment in any specific amount, plaintiff will be given an opportunity to challenge the reasonableness of the proposed costs and fees.

- Plaintiff's motion for summary judgment (Dkt. No. 78) is DENIED.

FACTS

This case involves negotiations between the parties for the sale of a building. Keystone had contemplated purchasing a building from Xerox. The sale fell through before a purchase and sale agreement could be finalized. Keystone sued Xerox for breach of contract, seeking damages or, in the alternative, specific performance. By prior Order, the Court ruled that there was no enforceable contract between the parties. Dkt. No. 69. Summary judgment was accordingly granted for defendant. Id.

The pending motions involve litigation over Xerox's sole counterclaim. For a period of time while this litigation was pending, Keystone had filed a lis pendens against the subject building. As a result, Xerox claims that it was unable to "pursue and accept a better offer from another party."

Answer to Second Amended Complaint and Counterclaim, p.5 ¶4. Although the lis pendens has since been voluntarily lifted by Keystone, Xerox seeks damages arising from the alleged interference with its sale of the building. In addition, Xerox seeks discretionary costs and attorneys' fees.

ANALYSIS

Because defendant has prevailed in the underlying action, defendant is entitled to seek actual damages caused by the filing of the lis pendens. RCW 4.28.328(3). The Court may also, in its discretion, award attorneys' fees to defendant. Id. Plaintiff is not liable for damages and fees if plaintiff "establishes a substantial justification for filing the lis pendens." Id.

The facts surrounding the imposition, and subsequent voluntary withdrawal, of the lis pendens are not in dispute. Thus, the only issue before the Court is whether plaintiff had "substantial justification" for the filing of the lis pendens. The Court concludes that plaintiff did not.

The Court has very little guidance in interpreting the meaning of "substantial justification." In fact, the Court is aware of only one published opinion which defines this crucial term.[1] See Richau v. Rayner, 98 Wn.App. 190 (Div. III 1999). In Richau, the appellate court upheld a trial court

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[1] Both parties have relied on additional cases which are far afield from the matter before the Court. Plaintiff cites to cases involving actions for slander to title. See Dkt. No. 82. Defendant cites to cases which define the "substantial justification" standard in unrelated contexts, such as the Federal and Washington Equal Access to Justice Acts. See Dkt. No. 81. The Court does not find any of this authority to be persuasive.

finding of no substantial justification in a case involving the filing of a lis pendens. Id. at 198. In reaching this conclusion, the appellate court noted that the record supported a finding that the parties who had filed the lis pendens were aware that they did not have any legal right to the property claimed. Id.

While the facts in Richau are not directly in line with the facts before the Court, the Richau holding is instructive. Lis pendens liability attaches if plaintiff knew (or should reasonably have known), at the time the lis pendens was filed, that it had no legal entitlement to defendant's property. The Court must examine the substance of plaintiff's claims in order to answer this question.

The Court concedes that the issue of contract formation is a difficult one. Plaintiff could have arguably believed that a contract was formed between the parties, and that specific performance was therefore an available remedy. If this litigation had rested on the question of contract formation alone, the Court might conclude that the filing of the lis pendens was substantially justified.

The filing of the lis pendens was not substantially justified, however, because plaintiff should have known from the outset that the alleged agreement to sell defendant's building was in violation of the statute of frauds. Plaintiff's Offer to Purchase defendant's building did not include a proper legal description of the property. In addition, neither party provided a written promise to buy or sell. Finally, neither defendant nor any agent authorized to bind defendant

signed any document agreeing to the sale of the building.[2] These violations of the statute of frauds were significant and should have been obvious to plaintiff. For that reason, the Court cannot conclude that plaintiff was substantially justified in filing a lis pendens against the subject property.

CONCLUSION

Plaintiff did not have substantial justification for filing a lis pendens against defendant's property. For that reason, partial summary judgment is GRANTED for defendant on its sole counterclaim. This ruling goes to the issue of liability only; defendant must still establish damages pursuant to RCW 4.28.328(3). Plaintiff's cross-motion for summary judgment is DENIED. Reasonable attorneys' fees and costs are awarded to defendant pursuant to RCW 4.28.328(3). Defendant shall submit an accounting of costs and fees at the conclusion of this litigation. After providing plaintiff an opportunity to be heard on the reasonableness of the costs and fees, the Court will order payment of a specific amount.

The Clerk of the Court is directed to distribute a copy of this Order to all counsel of record.

Dated this 12 day of July, 2002.

/s/
Marsha J. Pechman
United States District Judge

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[2] These issues were more fully analyzed by the Court in its prior Order granting summary judgment to defendant. See Dtk. No. 69.

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C01-1018P

[Filed, November 21, 2002]

KEYSTONE LAND & DEVELOPMENT COMPANY, Plaintiff,	)
v.	)
XEROX CORPORATION, Defendant.	)

ORDER MODIFYING JUDGMENT

This matter comes before the Court on plaintiff's motion to modify this Court's September 5, 2002, judgment to encompass this Court's July 12, 2002 order granting partial summary judgment for defendant on the issue of lis pendens liability. Having considered the pleadings and papers submitted by the plaintiff, and there being no opposition to the motion, the Court hereby GRANTS the motion. The judgment is hereby modified to allow Keystone to appeal the order granting partial summary judgment on lis pendens liability. A

judgment reflecting this modification will be issued concurrently with this order.

The Clerk is directed to send copies of this order to all counsel of record.

Dated: November 20, 2002.

/s/ _____
Marsha J. Pechman
United States District Judge

APPENDIX J

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No. C01-1018P

[Filed, November 25, 2002]

KEYSTONE LAND & DEVELOPMENT COMPANY,
Plaintiff,

v.

XEROX CORPORATION,
Defendant.

JUDGMENT IN A CIVIL CASE

____ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__XX__ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: Pursuant to Fed. R. Civ. P. 54(b), there being no reason for further delay,

the Court grants partial summary judgment for defendant on defendant's counterclaim and certifies this order as final so that it may be reviewed on appeal.

Dated: November 25, 2002

BRUCE RIFKIN, Clerk of Court

/s/_____
By, Deputy Clerk